No. 11,894

IN THE

United States Court of Appeals

For the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION, LOCAL 388, A.F.L., and WALTER J. TURNER,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the 21st Region of the National Labor Relations Board, on Behalf of the National Labor Relations Board,

Appellee.

APPELLANTS' PETITION FOR A REHEARING and BRIEF IN SUPPORT THEREOF.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Come now appellants and within proper time file this, their petition for rehearing, pointing out the following errors of the Court appearing on the face of the opinion.

I.

The Court correctly understood the issue herein, to-wit, whether peaceful picketing can be restricted to a circle comprising only an employer and his own employees, but this Court inadvertently failed to note that the Supreme Court of the United States has repeatedly held that picketing cannot be so restricted.

II.

This Court inadvertently failed to note that the Supreme Court of the United States has recognized the right of peaceful picketing within the nexus of the dispute, within the area of economic interdependence, and that the Court has definitely held that peaceful picketing of the type found in the case at bar is protected by the Bill of Rights.

III.

This Court correctly stated that picketing is designed to be effective and frequently is effective in that workers generally will not pass a picket line, but this Court erred grievously in holding that effective picketing is not protected by the Bill of Rights.

IV.

This Court has misconstrued the status of Section 8(c) in the situation at bar.

V.

The Court has misconstrued the decisions which mention unlawful purpose and has inadvertently failed

to note that the right of peaceful picketing has been upheld by the Supreme Court of the United States even though carried on in violation of and in defiance of a statutory enactment.

VI.

This Court has inadvertently taken a completely unrealistic view of the situation before us and has ignored the situation with regard to the constitutional right of peaceful picketing which is a matter of common knowledge with the bench, the bar, and legal literature.

Appellants respectfully pray the Court to grant a rehearing herein.

Dated, San Francisco, California,
January 7, 1949.

Respectfully submitted,
CLARENCE E. TODD,
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BRIEF IN SUPPORT OF PETITION FOR A REHEARING.

Appellants most earnestly urge this Court to grant a rehearing of this case, and in that behalf we wish to lay the following considerations before the Court:

We accept the statement of the issue found in the last paragraph on page 3 of the opinion, and where the Court (on page 5) relies upon the *Ritter's Cafe* case as decisive of the constitutional right of peaceful picketing within the particular industry in this case, we will point out that that decision holds to the exact contrary.

We believe that the Court has completely misconstrued the scope and effect of Section 8(c), and in particular that the Court did not have in mind the manner in which 8(c) was dragged into the case.

Finally, we believe that this Court has completely misapprehended the very meaning of picketing as it is discussed and upheld in the controlling decisions of the Supreme Court of the United States. And now let us proceed as briefly and succinctly as we may to the points of the argument.

I.

THE ISSUE HERE AS POSED BY THE GENERAL COUNSEL AND AS ACCEPTED BY THIS COURT AS TO WHETHER PICKETING CAN BE RESTRICTED TO A CIRCLE COMPRISING AN EMPLOYER AND HIS OWN EMPLOYEES HAS BEEN REPEATEDLY DECIDED BY THE SUPREME COURT OF THE UNITED STATES IN FAVOR OF THE CONTENTION OF APPELLANTS HEREIN.

At page 3 of the opinion the issue is summarized in this way: "The debate here is whether peaceful picketing may constitutionally be confined to the area of an industrial dispute, or in plainer language, to the premises of the employer with whom the dispute is in progress." This is the position taken by the attorney for the Regional Director.

Now we respectfully submit that this very question has been before the Supreme Court of the United States not once but repeatedly and in every single instance the Supreme Court has held distinctly, and in several cases by the use of the same terms as quoted

above, that economic activity cannot be so confined. In the case of *A. F. of L. v. Swing* (312 U.S. 321, 61 S.Ct. 568 [85 L.Ed. 855]), cited repeatedly in our Opening Brief, the same contention was made with regard to the right to limit picketing to an area comprising only an employer and his own employees and the Supreme Court said (at page 326), "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."

We have in mind the distinction sought to be drawn by this Court in its opinion between picketing which is free speech and picketing which is conducted in support of a boycott; in other words, between ineffective and effective picketing. This we shall discuss fully a little later. But just now we are talking about the *area* of picketing, not its effectiveness or ineffectiveness, and it is clear that when this Court seeks to restrict the *area* to a circle comprising only an employer and his own employees the Court is attempting to overrule the decisions of the Supreme Court of the United States.

While considering this point, it may be well to recall that this same language was used by the Supreme Court in *Cafeteria Employees Union v. Angelos,* 320 U.S. 293, at 296. Although the *Angelos* case, decided a year and a half after the *Ritter's Cafe* case, was cited repeatedly to this Court by appellants (Op. Br. 33, 47, 51; Reply Br. 11, 12) the instant opinion *totally*

ignores this latest pronouncement by the Supreme Court on the constitutional aspects of peaceful picketing. In relying upon the *Ritter's Cafe* case for the proposition that "* * * the state has the right to determine whether the common interest is best served by imposing restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces", this Court has chosen to disregard the *unanimous decision* in the *Angelos* case which gave recognition through the opinion of Mr. Justice Frankfurter (who also wrote the *Ritter's Cafe* opinion) to "* * * the right of workers to state their case and to appeal to the public for support in an orderly and peaceful manner *regardless of the area of immunity as defined by State policy.*"

In addition we call the Court's attention to *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287, where it appears in the statement of the case that the employers brought suit against the union "to enjoin defendants from interfering with the sale of plaintiff's products by picketing stores where its products were sold," etc. And in that case it was held that such picketing was a constitutional right and could not be restrained where it was carried on peacefully. (See pages 298, 299.)

II.

THE SUPREME COURT IN THE RITTER'S CAFE CASE DID NOT RESTRICT THE AREA OF PICKETING TO AN EMPLOYER AND HIS OWN EMPLOYEES BUT RECOGNIZED THE RIGHT OF PICKETING ANYWHERE WITHIN THE INDUSTRY.

The *Ritter's Cafe* decision (315 U.S. 722) is cited in favor of various forms of restriction. The learned trial judge in the case at bar cited the *Ritter's Cafe* decision as prohibiting "coercive" picketing; and the opinion of this Court cites the same decision as upholding the limitation of picketing to the premises of the employer and to a circle comprising only an employer and his own employees.

The *Ritter's Cafe* case occupies an interesting position. It has never, so far as the Citator shows, been cited by the Supreme Court of the United States, not even in subsequent picketing decisions written by the same author. However, it was a majority decision, has never been reversed and is accepted here as laying down a certain limitation on picketing under certain circumstances then before the Court.

The facts are no doubt familiar to the Court. The carpenters and painters had a dispute with a building contractor who was employing non-union labor. They picketed the building project and the Supreme Court of the United States in this decision upheld their right to picket the building project and, impliedly, to picket the building contractor wherever he might be engaged (page 727). However, the courts of Texas held, and the Supreme Court of the United States affirmed the ruling, that the carpenters and painters might be pre-

vented by state law and by consequent injunction from picketing a fully unionized restaurant located a mile and a half from the building project and having, so far as the record shows, no connection with the building then being constructed, except that the restaurant belonged to the same man who had engaged the contractor to construct the building a mile and a half away.

The Supreme Court of the United States held that there was no "nexus" between the construction of the building for some unidentified purpose and the fully unionized cafe, and the Court spoke in that regard of the conscription of neutrals. In order to make perfectly clear what they meant, or rather what they did not mean, by "neutrals" or "conscription" the Court went out of its way (at page 727) of the *Ritter's Cafe* decision to reaffirm the decision handed down the same day in *Bakery and Pastry Drivers v. Wohl,* 315 U.S. 769, where they upheld the right of striking bakery drivers to picket the customers of their employer.

Thus we find that a careful examination of the *Ritter's Cafe* case shows that in the first place it says nothing about "coercive" picketing as distinguished from any other kind of picketing. In other words, it does not discuss the nature of picketing at all, though it takes for granted that lawful picketing will probably cause damage to the person picketed. Far from limiting the area of picketing to a circle comprising an employer and his own employees, the Court, by its reference to the *Wohl* case indicates that the decision is not intended to have that effect at all. What the

decision does uphold is the right of picketing anywhere in the industry, thus approving without specifically mentioning the language of Chief Justice Taft in the old *Tri-City* case (*American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, at 213, 214) where it was held that the members of a labor union, and the union itself, are interested in labor conditions throughout the industry. (See also to the same effect page 209.)

In the case at bar, we have peaceful picketing by employees of a struck employer of the products of the employer located on trucks and ready for shipment. This is completely analogous to the picketing by the milk wagon drivers of the product of their employer—milk—in the *Meadowmoor* case, supra, or by the bakery drivers of the products of their employer, to wit, bread, in the *Wohl* case. In fact, in the latter two cases the language of the Court refers to the picketing of the customers themselves rather than of the product, and while this might seem to indicate a distinction between "secondary boycott" and a "product boycott" it would not seem necessary to go further into this distinction at this time.

The *Ritter's Cafe* case does not in any way support the opinion of this Court, and we ask for a rehearing for that, among other reasons.

III.

THIS COURT HAS INTERPRETED THE RESTRICTIONS OF SECTION 8(b)(4)(A) IN A MANNER WHICH DOES VIOLENCE TO ITS LEGISLATIVE HISTORY.

While this Court is quite correct in stating that the Taft-Hartley Act does not use the terms "hot cargo," "picketing the product," or "secondary boycott," (Opinion, p. 4), neither does Section 8(b)(4)(A) refer to any form of picketing in express terms. On its face, the statute forbids unions or their agents to "induce or encourage" certain prohibited activity, without reference to means. This admittedly broad and sweeping restriction must be interpreted with reference to the legislative history. (The Court will recall that the General Counsel's attorney agreed at the oral argument of this case that he would furnish the Honorable Judges with a copy of the 2-volume compilation of the legislative history of the Labor Management Relations Act, 1947, prepared by the National Labor Relations Board and published by the Government Printing Office, for use in administering the statute.)

In refusing to make the distinction between the type of picketing involved in this case, and other concerted activities aimed at bringing full-scale economic sanctions against a non-disputing employer, this Court has overlooked or failed to give weight to the debate between Senator Robert A. Taft of Ohio and Senator Claude Pepper of Florida, cited at page 55 of appellants' Opening Brief. There Senator Pepper contended that under Section 8(b)(4)(A) "the language

would forbid one man or one agent of a labor union going to the employees of another employer working on a product put out by a manufacturer who would be unfair to them in their opinion and attempting to *persuade or induce those workers not to handle the output* of the factory in which there was a disagreement with the workers," and Senator Taft immediately rejected the notion by stating, "I do not quite understand the case which the Senator has put. This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." (93 Daily Cong. Rec. 4322-4323, 4/20/47.)

IV.

THIS COURT HAS MISCONSTRUED THE STATUS OF SECTION 8(c) IN THIS LEGAL SITUATION.

This Court, in the second paragraph on page 4, seems to indicate that defendants were the first to cite Section 8(c) for their own protection. This is erroneous. Section 8(c) was brought into the case by the Regional Director by inserting in the findings a recital that the picketing, which this Court concedes was peaceful (page 3 end of first paragraph), contained a threat of reprisal or force and promise of benefit.

There was no such statement in the charge and we object most strenuously to the insertion of that language in the finding without there being the slightest

evidence to support it. And now let us take up the language of this Court in attempting to uphold this finding. In the last paragraph on page 4 this Court discusses the ordinary effect of a picket line, and in particular the feeling and the conduct of union workers in the presence of a picket line. This Court recognizes that union members usually respect a legitimate picket line, and the Court states that it is naive to assume that a picket line which is thus respected is merely a means of disseminating information.

What is naive about that statement is that picketing is unlawful the moment it becomes effective! The nationwide citation in anti-labor briefs to the language of Justice Douglas in his concurring opinion in the *Wohl* case to the effect that picketing is more than speech naively assumes that the minute picketing becomes more than speech, that is the minute it becomes effective, it becomes illegal. This argument parts company completely with the decisions of the United States Supreme Court upholding the right of peaceful picketing, as we shall show.

Thus, the Trial Examiner who heard the "unfair labor practice" charges which gave rise to the instant injunction, took a view in his Intermediate Report regarding the "application of Section 8(c) to Section 8(b)(4)(A)" which is completely contrary to that of the District Court and this Court of Appeals herein. (Intermediate Report of Trial Examiner A. Bruce Hunt, issued May 4, 1948, in *Matter of Print-*

ing Specialties and Paper Converters Union, Local 388, A.F.L. and Sealright Pacific, Ltd., NLRB Case No. 21-CC-13.)

In holding that Section 8(c) is applicable to Section 8(b)(4)(A) and that peaceful picketing under the circumstances embraced here is embraced within the immunizing language of Section 8(c), the Board's Trial Examiner cites *Thornhill v. Alabama,* 310 U.S. 88, 102, *Carlson v. California,* 310 U.S. 106, 113, *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 293, *A. F. of L. v. Swing,* 312 U.S. 321, 323, as well as the *Ritter's Cafe* and *Wohl* cases, stating:

> "* * * the language of Section 8(c) specifically states that it shall be applicable to allegations of unfair labor practices 'under any of the provisions of this Act.' That statement is not ambiguous * * *
>
> "These cases, manifestly, require the conclusion that peaceful picketing is a form of free speech. As such, peaceful picketing must be regarded as embraced within the following language of Section 8(c): 'The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form * * *' " (I.R., p. 18.)

In view of the submission by the General Counsel of the opinion in *United Brotherhood of Carpenters and Joiners of America v. Sperry* (C.C.A. 10th, decided November 2, 1948), ... F. (2d) ....., after the conclusion of oral argument herein, and the complete failure of this Court to afford appellants any oppor-

tunity to comment upon said opinion before the decision of this appeal, we wish to specifically urge rehearing for those particular reasons. We desire a reasonable opportunity to pont out the distinction between the *Carpenters* case and the instant one as to the facts, particularly since this Court has twice cited that opinion which holds that "The promulgation and circulation of a blacklist and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or Section 8(c) of the act." Whatever may be said as to the correctness of the *Carpenters* decision, it is not entitled to even persuasive authority herein. We will point out to this Court, upon rehearing should this request be granted, how the Board's Trial Examiner in the *Printing Specialties* case relied upon the absence of power of the appellant labor organization to discipline employees of Sealright and West Coast for working in the presence of its pickets as a strong factor in placing these picketing activities within the immunizing language of Section 8(c).

The opinion of this Court lays down the view that picketing is "* * * something other than a mere expression of views, argument or opinion" because it constitutes "an appeal for solidarity." Concededly the effectiveness of a picket line does not lie in its value as a disseminator of information to the "unfair" employer. District Judge Rifkind made this very plain in construing Section 8(b)(4)(A) in *Douds v. Metropolitan Federation of Architects,* 75 F. Supp.

672, when he said, "The effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience."

This Court has completely disregarded the fact, called to its attention at pages 64-65 of Appellants' Opening Brief, that the language of Section 8(c) closely approximates the references in the *Thornhill* and *Carlson* cases to picketing as one of the appropriate methods for "the dissemination of information concerning the facts of a labor dispute." In *Thornhill v. Alabama*, 310 U.S. 88, the Supreme Court refers to "the means used to publicize the facts of a labor dispute, whether *by printed sign, by pamphlet, by word of mouth, or otherwise.*" *Carlson v. California*, 310 U.S. 106, hold that "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern," citing *Stromberg v. California*, 283 U. S. 359, the so-called "red flag" case. The reference in the *Carlson* case to "appropriate means, whether *by pamphlet, by word of mouth, or by banner,*" undoubtedly inspired the descriptive expression concerning "*written, printed, graphic, or visual form*" of disseminating views, argument, or opinion contemplated by Section 8(c).

By holding that Section 8(c) is inapplicable to picketing because it appeals for concerted action by fellow workmen, this Court has declined to follow the "free speech" doctrine of the Supreme Court, which declared in *Thomas v. Collins*, 323 U. S. 516, 537, that

"The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."

V.

THE SUPREME COURT OF THE UNITED STATES IN UPHOLDING THE RIGHT OF PEACEFUL PICKETING AS A PHASE OF THE CONSTITUTIONAL RIGHT OF FREE SPEECH HAS UPHELD THE RIGHT OF EFFECTIVE AND SUCCESSFUL PICKETING PURSUANT TO A PEACEFUL BOYCOTT SO LONG AS THE PICKETING IS PEACEFUL.

In *Thornhill v. Alabama,* 310 U. S. 88, the statute which the Supreme Court invalidated as abridging the right of free speech did not refer to "speech" at all. It prohibited any one from going near a place of business for the purpose of influencing or inducing other persons not to do business with that particular establishment; in other words, to boycott the particular place. Under this statute the kind of picketing which this Court seems to approve was not forbidden, that is to say, the mere carrying of a banner somewhere making an announcement of some kind, possibly of the existence of a labor dispute, but without any effect whatever upon passersby. The statute prohibited the boycott of a place of business by a picket line for the purpose of preventing the patronage of that particular place of business, and it was this *prevention of patronage* which the Supreme Court was referring to when the Court said at page 102:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarding as within that area of free discussion that is guaranteed by the constitution,"

And on pages 104, 105, the Court said:

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

Bear in mind that the statute as set out on pages 91 and 92 of the decision says nothing about conversation nor does the summary of the complaint against petitioner, found at page 92, refer to anything done by the picket except that he loitered and picketed for the purpose of hindering, delaying and interfering with the business of the party picketed. And on page 99 the Court, in referring to the purpose of the picketing, as understood by the Supreme Court in this decision upholding picketing as a constitutional right, said, "the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer."

And on page 100 the intention is again referred to in this language, "An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute."

This would clearly refer to union members and to their natural reaction to a picket line as referred to by this Court in the last paragraph on page 4 of the opinion. That the Supreme Court well understood that the picketing might be effective and might cause damage to the person picketed is clearly shown on page 104 where the Court said:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group on society."

It is clear then that the Supreme Court of the United States understood perfectly the rule which it was laying down in the *Thornhill* case, and there is no harm in recalling that there was no dissent from this opinion,—all the justices concurring except Justice McReynolds. The picket line as a means of protecting the economic interest of the workers has been in use for a long time, for generations in fact. And to

borrow the language of this Court again, the Supreme Court of the United States in the Thornhill decision was not so naive as to misunderstand or misconstrue in any way the effect of a peaceful picket line.

It is idle to discuss the constitutional right of peaceful picketing as if it includes only futile and ineffective utterances. The right of peaceful picketing is protected by the Bill of Rights and by the Supreme Court of the United States in a dispute by a union "deemed by them to be relevant to their interests" (*A. F. of L. v. Swing*, supra, at page 326), the language being that of Mr. Justice Frankfurter, the author of the opinion in the *Ritter's Cafe* case.

In fact, there is no case with which the writer is familiar where the right of absolutely futile, ineffective, sterile picketing has been adjudicated. Nor has there ever been any occasion for such adjudication. When striking workers give up their days to the carrying of a banner they are not doing it for fun. They are doing it to enlist sympathy in their particular battle. In some circumstances their appeal is primarily to the public and in other cases, as in the one at bar, they are appealing to their fellow workers. In either case they intend and expect the picketing to be effective.

VI.

THE MISINTERPRETATION AND MISCONCEPTION BY THIS COURT OF THE RIGHT OF PEACEFUL PICKETING SEEKS TO OVERRULE THE SUPREME COURT OF THE UNITED STATES AND TO NULLIFY THE PROVISIONS OF THE FIRST AMENDMENT.

Fifty years ago a decision of this Court disapproving the right of picketing for the purpose of interfering with business would have been readily understood. But in this year of 1948, in view of the decisions of the Supreme Court of the United States for the last ten years, beginning with the *Senn* case (301 U. S. 468, decided May 24, 1937), the decisions of federal Courts holding that under the Taft-Hartley Act peaceful picketing of the type involved here can be enjoined are simply incomprehensible.

And the manner in which this conclusion is arrived savors of the magical. The definition of the physical act of picketing, as set out in the decision of this Court herein and of the Court of the Second Circuit in the *Sperry* case referred to by this Court, does not vary from that of the Supreme Court of the United States in the *Senn, Thornhill, Meadowmoor, Swing, Angelos, Wohl and Ritter's Cafe* cases, nor in fact could the definition be changed because picketing is an objective act familiar to all of us. This Court, in the last paragraph on page 4 of the decision, correctly describes certain features, as for instance, that picketing may be something more than a mere expression of views, argument or opinion, that it frequently or habitually constitutes an appeal for solidarity and that workers are reluctant to cross a picket line. All

of the decisions of the Supreme Court of the United States referring to picketing have recognized these aspects and characteristics, and it is with this full recognition that the Supreme Court has upheld the right of peaceful picketing as a constitutional right. Where the right of picketing has been limited by the Supreme Court it has never been because of the effectiveness of peaceful picketing in a dispute involving employment relations for the purposes of collective bargaining. In the *Meadowmoor* case, the picketing was enjoined because of the violence, the threat of which the Court found was still in existence. But the Court made it clear that the restraint must cease the moment the picketing resumed a peaceful character. In the *Ritter's Cafe* case, picketing was not prohibited because it was effective, because workers refused to cross the picket line, or because it would cause injury. The picketing of one particular place of business was enjoined for the sole reason that that particular business was not within the *nexus* of the dispute.

In the *Allan-Bradley v. Local No. 3* case (325 U. S. 797) a boycott by the workers in their own interest was held lawful, the prohibition going only to action by the union on behalf of employers in a program of price fixing and market control.

But enough of generalization. The picketing involved here was directed at the product of a struck employer. It was not even directed personally at the carriers or the customers in whose possession the product was found. But, assuming that this was

actual picketing pursuant to a secondary boycott, it was the precise type of secondary boycott in which the Court upheld the right of peaceful picketing in *Milk Wagon Drivers v. Meadowmoor Dairies* so long as it was peaceful, and in *Bakery Pastry Drivers v. Wohl* which was expressly affirmed in the *Ritter's Cafe* case (at page 727) for the evident purpose of making it clear that the limitation in the *Ritter's Cafe* decision did not go to the extent of prohibiting a secondary boycott.

And the picketing at bar was the exact type which was upheld by the Supreme Court of California by a vote of six to one in the case of *In re Blaney,* 30 Cal. (2d) 643. While that decision is not binding upon this Court, its language is extremely persuasive. It cites the decisions of the Supreme Court of California, but also cites and relies upon the same decisions of the Supreme Court of the United States on which appellants here place their reliance.

VII.

THE PICKETING AT BAR WAS NOT FOR AN UNLAWFUL PURPOSE.

The expression "picketing for an unlawful purpose" is frequently used in cases of the type of the one at bar. In the *Blaney* case, above referred to, the Supreme Court of California made this very pertinent comment: "And the purpose of the economic pressure and the means used to exert it must be lawful (citations), but that proposition poses the question

in terms of results. Rather it is merely stating the problem in other words. The question still remains as to what purposes or what means may be declared unlawful by the legislature or the Courts without violating the provisions of the Constitution." The Supreme Court of California then proceeds to cite the decisions of the Supreme Court of the United States which we have cited to this Court in the case at bar, namely, the *Meadowmoor Dairy* case where the means employed included extreme violence, the *Ritter's Cafe* and *Wohl* cases, the *Swing* case and *Near v. Minnesota.* And the Supreme Court of California, as above stated, proceeded to hold picketing of the exact type of that in the case at bar to be in the exercise of the constitutional right of free speech under the First Amendment.

Let us see what we mean—"unlawful purpose." The unlawful purpose in the case at bar is very evidently the violation of the Taft-Hartley Act. If picketing and violation of a statute is picketing for an unlawful purpose, then the picketing in *Thornhill v. Alabama* was for a like unlawful purpose. The language of the Alabama statute was, for the purpose of our present discussion, completely analogous with the language of the Taft-Hartley Act because it prohibited picketing for the purpose of causing injury to the person picketed. Similarly, the picketing in the *Blaney* case was in violation and defiance of the California Hot Cargo Act which language is to the same purport, so far as our purpose is concerned, as that of the Taft-Hartley Act.

In *Swing v. A. F. of L.*, 312 U. S. 321 [85 L. Ed. 855], the picketing in a controversy other than a dispute between an employer and his own employees was contrary to the public policy of the State of Illinois and therefore against public policy as the term seems to be understood in the case at bar.

The Court will note that in the *Thornhill* case while the picketing was in violation of the statute of the state of Alabama, the Supreme Court upheld the right to picket as a constitutional right, and annulled the statute. In the other cases mentioned, the right to picket was upheld under the constitutional guarantee. In the case at bar, we have argued that if Section 8(c) is read with the remainder of the provisions relied upon, the picketing will not be in violation of the statute, since it will come under the exception, but that if it is held (as this Court has held) that Section 8(c) has no application, then, since the picketing is clearly the exercise of a constitutional right, this portion of the statute must fall.

With regard to the connection of Section 8(c) which this Court held to have no application, we may again remind the Court that the general counsel and his attorneys not only believe that Section 8(c) does apply but that they apparently consider it vital to their case since they injected into the findings a description of the picketing as (impliedly) containing a threat of reprisal and promise of benefit.

The reliance of the attorneys for the Board upon the text of the Taft-Hartley Act and the congressional

discussions which accompanied its formulation and passage makes out a clear case of conflict between the Taft-Hartley Act and the Bill of Rights. The Bill of Rights says that workers along with everybody else have the right of free speech and the Supreme Court of the United States has interpreted this right of free speech as the right to publicize a labor dispute peacefully and within the economic *nexus* for the purpose of influencing other workers and the public to withdraw or withhold their patronage from the picketed concern. Along comes the Taft-Hartley Act and says that this type of picketing cannot be done, just as the Legislature of Alabama said it could not be done, the Legislature of California under the Hot Cargo Act said it could not be done, or public policy of the State of Illinois said it could not be done, and yet these statutes and this public policy were held by the Supreme Court of the United States to be inferior and subordinate to the Bill of Rights. The same ruling must be applied to the Taft-Hartley law.

VIII.

THE ECONOMIC JUSTIFICATION FOR PICKETING THE PRODUCT IN THE WOHL CASE ALSO SHOULD HAVE BEEN FOUND TO EXIST HEREIN.

This Court has declined to apply the holding in *Bakery Drivers Local v. Wohl,* 315 U.S. 769, to the present case upon the assumption that the facts and circumstances there were "peculiar" and "extraordinary". It finds that in the *Wohl* case, the Supreme

Court thought "it was practically impossible for the union to make known its legitimate grievances" except by means of a product boycott.

Without being ready to admit that the *Wohl* case stands for so narrow a proposition, we urge that the identical economic justification for a product boycott appears in the instant case. It apparently was not considered although called to this Court's attention at pages 8 and 9 of appellants' reply brief. The nature of Sealright products—milk bottle caps and paper food containers—like the bakery goods in the *Wohl* case—causes them to lose their identity as to place of manufacture before reaching the ultimate consumer. The District Court injunction forbidding the Sealright strikers from following the subject matter of the dispute, set apart a particular enterprise—Sealright—and freed it from all effective picketing in the same fashion as the New York injunction in the *Wohl* case, concerning which Mr. Justice Douglas said:

> "If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line."

IX.

NOTHING CONTAINED IN THIS OPINION INDICATES THAT THE "CLEAR AND PRESENT DANGER" TEST WAS EVEN CONSIDERED.

Despite repeated references by appellants to decisions of the Supreme Court holding that labor speech, including peaceful picketing, may not be curtailed in

the absence of a "clear and present danger" of the gravest abuses endangering our form of society as a whole, the opinion is completely silent as to this fundamental argument. (Op. Br. 44-45, 57; Reply Br. 10.)

In the *Carlson* case, the Supreme Court of the United States declared:

> "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting *no clear and present danger* of substantive evils within the allowable area of State control."
>
> (310 U.S. at 113, emphasis added.)

The power of Congress under "The Commerce Clause"—like the police power of a State—is subject to the basic guarantees of the Bill of Rights.

In *Bridges v. California,* 314 U.S. 252, the Supreme Court again pointed out that restrictions upon peaceful picketing were subject to the exacting test applied to all forms of curtailment of the cognate rights assured by the First Amendment:

> "* * * very recently we have also suggested that '*clear and present danger*' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destructive of life or property, or invasion of the right of privacy.' *Thornhill v. Alabama,* 310 U.S. 88, 105, 60 S. Ct. 736, 745, 84 L. Ed. 1093 * * *"

Government's power to regulate labor union activity as an exercise of its duty to safeguard and promote the public welfare must not trespass upon the domains set apart for free assembly and free speech unless grave danger to paramount interests would thereby be prevented. This rule is equally applicable to laws aimed at preventing union officers or members from *platform speaking* (*Hague v. C.I.O.,* 307 U.S. 496: *Thomas v. Collins,* 323 U.S. 516), *handbilling, Schneider v. Town of Irvington,* 308 U.S. 147), or picketing (*Thornhill, Carlson, Wohl, Swing* and *Angelos* cases, *supra*). Yet, nowhere does this Court's opinion indicate that any consideration was given to this test in passing upon the validity of Section 8(b)(4)(A).

It is significant that the opinion does refer to Section 8(b)(4)(A) as a statute which "* * * *broadly sweeps within its prohibition* an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest". (p. 4.) Under the "clear and present danger" rule, as applied in *Thornhill v. Alabama* and *Carlson v. California,* such a statute "which does not aim specifically at evils within the allowable area of state control, but on the contrary *sweeps within its ambit* other activities that in ordinary circumstances constitute an exercise of freedom of speech* * *" must be declared unconstitutional, for "The existence of such a statute results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as coming within its purview."

While it is true, as the opinion states (p. 4), that "The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the Courts are entitled to concern themselves", nonetheless this Court cannot escape the duty laid down for it by the Supreme Court in *Thomas v. Collins,* which said:

> "* * * in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, *whatever the legislative judgment,* in the light of our constitutional tradition. *Schneider v. State,* 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative to support an intrusion upon that domain, only if *grave and impending public danger* requires this."

X.

THE ONE THING NECESSARY FOR A SOLUTION OF THE ISSUE BEFORE US IS A REALISTIC APPROACH.

The argument on which counsel for the Board relies in its opinion is that if the acts charged are violations of the Taft-Hartley law they must be enjoined. There is substantial agreement that the acts charged are violations of some of the language of the Taft-Hartley Act except as qualified by Section 8(c). The question here is no different from the question which has arisen in so many of the picketing injunction cases, namely, does the particular statute or ordinance attempt to prohibit peaceful picketing within the area of a labor dispute? The answer here cannot be any different

from the answer in cases of other statutes which have sought to do what this particular portion of this statute attempts to do.

Ever since the Taft-Hartley Act was passed it has been recognized by thoughtful lawyers not deafened by the din and commotion in favor of the enforcement of every jot and tittle of the measure that the provisions here under consideration might infringe upon the constitutional right of peaceful picketing. Articles in law journals have raised this point, and in a recent bulletin put out by the Commerce Clearing House Labor Law Reporter appears an article headed "Picketing and the Right of Free Speech", being paragraph 5120 at page 5621. Here we find a very calm and objective appraisal of the right of peaceful picketing—primary and secondary—and a suggestion that if the Taft-Hartley Act attempts to prohibit peaceful picketing—primary or secondary—it may be unconstitutional. Some of the propositions are: "If the picketing is peaceable, however, it is protected even though it does not arise in an employer-employee relationship; i.e., 'stranger' picketing is protected by the right of free speech. 'Secondary' picketing, the picketing of businesses or persons not directly involved in the labor dispute, is likewise held immune to restrictive legislation, except where the pickets leave the industrial 'area' of the original dispute to bring into it parties who are not in 'unity of interest'. * * * The Supreme Court has held that picketing is protected notwithstanding the fact that it may induce or encourage a boycott, and, as we have seen, 'secondary'

picketing is held immune so long as it remains within the industrial area where the labor dispute arose." That change is well known to authorities on labor law and should not be ignored in the solution of the question at bar. The United States Supreme Court for a decade has upheld the right of peaceful picketing under the exact circumstances found here and for the exact purposes and with the precise effects which are found to exist in the case at bar, and the Supreme Court has upheld this constitutional right regardless of statutes or of public policy. Since these are matters of common knowledge it is extremely unrealistic to have them ignored in the decision of this case on the assumption that the Bill of Rights has been repealed or abridged by the passage of the Taft-Hartley law.

When the law was first enacted strong arguments were made to the effect that this congressional statute expressed a definite national policy which presumably would continue in effect indefinitely. On the second of last November a popular referendum was taken on a number of issues, including the issue of the Taft-Hartley Act, and the vote of the people seemed to forecast a different national policy so far as the Taft-Hartley Act is concerned. If the Taft-Hartley Act is repealed by the Eighty-first Congress, such repeal will constitute a declaration of public policy to the same extent as but no more than the original passage of the Act by the Eightieth Congress, *non constat*, but the Eighty-first Congress might re-establish the Act in certain respects, or entirely.

The above suggestions are made to indicate the soundness of a judicial policy which shall adhere to the words of the Constitution,—which cannot be amended by each successive Congress in accordance with prevailing public opinion at the time. The decisions of the Supreme Court which we have referred to, some of them unanimous like the *Wohl* case, others practically so, like the *Thornhill* case, have rested strictly and strongly on the provisions of the Constitution. We ask this Court to grant a rehearing of this case in order that the final decision may be in accordance with those constitutional principles.

Appellants respectfully pray the Court to grant a rehearing herein.

Dated, San Francisco, California,
January 7, 1949.

Respectfully submitted,
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Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 7, 1949.

CLARENCE E. TODD,
Of Counsel for Appellants and Petitioners.